United States Court of Appeals

for the Second Circuit

APPELLEE'S BRIEF

74-1613

To Be Argued By
A. SETH GREENWALD

UNITED STATES COURT OF APPEALS
FOR THE SECOND CIRCUIT

----------X

FERMINA MONTEZ, et al.,

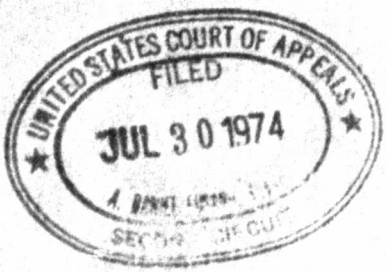
Appellants.

-against-

GEORGE K. WYMAN, et al.,

Appellees.

----------X



BRIEF FOR DEFENDANT-APPELLEE WYMAN

LOUIS J. LEFKOWITZ
Attorney General of the
State of New York
Attorney for Defendant-Appellee
Wyman
Office and P.O. Address
Two World Trade Center
New York, New York 10047
Tel. No. 212(488-3396)

SAMUEL A. HIRSHOWITZ
First Assistant Attorney General

A. SETH GREENWALD
Assistant Attorney General
of Counsel

2

TABLE OF CONTENTS

TABLE OF AUTHORITIES

Cases

Statutes

Federal

Regulations

Federal

State

UNITED STATES COURT OF APPEALS
FOR THE SECOND CIRCUIT

----------X

FERMINA MONTEZ, et al., :

Appellants, : Docket No. 74 - 1613

-against- :

GEORGE K. WYMAN, et al., :

Appellees. :

----------X

BRIEF FOR DEFENDANT-APPELLEE
WYMAN

Questions Presented

1. Under the Eleventh Amendment is the State defendant immune from suit for payment of retroactive damages for alleged deficiencies in payment of Aid to Dependent Children?

The court below answered "yes".

2. In the exercise of the federal court's equity powers, is the City Defendant liable for retroactive damages for alleged past deficiencies in Aid to Dependent Children?

The court below answered "yes".

Statement

The appellants have presented a "statement of the case" which fails to shed any light on the status and facts of this action.

This action was commenced in 1969, some five years ago, to challenge the enforcement of a regulation of the New York State Department of Social Services, of which defendant WYMAN was then Commissioner. Defendant Goldberg, then New York City Commissioner of Social Services was also named a defendant.

Judge Bonsal in his memorandum of May 7, 1973 and March 25, 1974 dismissing the complaint as against the State and City defendants noted that the action started on October 31, 1969 to enjoin the enforcement of § 353.3(a)(2) of the Regulations of the Department of Social Services, State of New York, (18 N.Y.C.R.R. 353.3[a][2]), commonly known as the "step-parent" regulation. It provides that the income of a step-parent in excess of his own needs or responsibilities is to be applied to the needs of his stepchildren when computing the amount of public assistance. The complaint alleged that this regulation was in violation of the United States Constitution (14th Amendment, due process, equal

protection, and right to privacy), and also in violation of a regulation of the U.S. Department of Health, Education and Welfare, 45 C.F.R. §§ 201 et seq., issued under the Social Security Act (42 U.S.C. §§ 601 et seq.).

We cannot ignore the fact that when plaintiff remarried to Luis Perdomo (the step-parent), he became responsible for support of his wife and a son born later in 1969,* regardless of the validity of the step-parent regulation. Thus when Judge Frankel of the District Court denied any restraining order or convening of a three-judge court, 28 U.S.C. §§ 2281, 2284, the case was simply a "question as to past allowances." (Memo, December 11, 1969). We believe this was because the step-parent had no excess income which meant the regulation had no further application.

Intervention of additional plaintiffs to revive the action as one for an injunction was denied by Judge Metzner, May 27, 1970. The applicants for intervention then became the Cancel case which, it should be noted, was reinstituted after Judge Conner's dismissal order of March 6, 1974, (noted in Judge Bonsal's memo) due to the class action aspects, 321 F. Supp. 528, 533 (S.D.N.Y. 1970); app. dism. 441 F. 2d 553 (2d Cir. 1971).

*The complaint concerns events in 1969 only.

The plaintiff then sought summary judgment. There was a claim of $809.20 for retroactive damages. Judge Metzner denied this on May 5, 1971. He held the constitutional claim insubstantial and raised doubts that plaintiff had suffered any damages. See affidavit of Sidney Lanes for the City of New York in connection with this motion.

Then the action was dismissed by Judge Bonsal for lack of prosecution on September 20, 1972, over a year after the denial of summary judgment. Plaintiff requested reinstitution of the complaint which was granted on January 18, 1973. At this point the defendant WYMAN moved to include the defense of the Eleventh Amendment to bar retroactive payments and dismiss the complaint. The motion was granted May 7, 1973 and an order dismissing WYMAN was signed May 29, 1973.

This left the City defendant Goldberg. Judge Bonsal treated the City's motion to dismiss presented after dismissal of the State as one for summary judgment and granted such motion March 25, 1974, with an order signed May 20, 1974. In the memorandum, the Judge noted that plaintiff had filed an affidavit in 1971 claiming $809.20 for 1969 but in 1974 claimed $1,795.32. This was all shown by the City on the basis of cancelled public assistance checks to be incorrect. The Court concluded that plaintiff was entitled to $2,025.18

benefits for 1969, but had actually received $2,051.45. In essence, rather than plaintiff having been damaged, she had been overpaid. And regardless of the lack of damage to plaintiff, award of retroactive damages in cases of this nature lie within the Court's equity powers citing Rothstein v. Wyman, 467 F. 2d 226 (2d Cir. 1972), cert. denied, 411 U.S. 921 (1973). On the basis of the record, Judge Bonsal saw no reason to exercise such powers.

The plaintiff filed a notice of appeal almost immediately (March 29, 1974), on receipt of the March 25, 1974 memorandum which clearly stated at the end "Settle order on notice." The final order, was noted, was signed May 20, 1974. Thus there has never been an appeal from the order of dismissal* of the latter date. There has been a failure to comply with Fed. R. of App. Proc. 4a, which requires appeal within 30 days of the date of the entry of the judgment on order appealed from..." The Memorandums in this action clearly were not "orders", so we have a grossly premature appeal.

POINT I

THE COMPLAINT WAS PROPERLY DISMISSED AS TO DEFENDANT WYMAN REGARDLESS OF WHETHER THERE WERE DAMAGES

The plaintiff's argument seems to be directed against City defendant, and thus ignores the sound legal basis on

*As a final order this was the only "order" that was appealable. 28 U.S.C. § 1291.

which defendant WYMAN was dismissed from the action.

The only issue in this action was retroactive payment for alleged past deficiencies in Aid for Dependent Children, (AFDC) payments. See Judge Bonsal's memorandum of May 7, 1973, p. 5. Assuming, arguendo, the step-parent regulation in violation of HEW regulation and further assuming some damages, the relief sought -- retroactive damages, could not be awarded against defendant WYMAN. This is the clear holding of Rothstein v. Wyman, supra, 467 F 2d 226 (2d Cir. 1972). The Court of Appeals indicated in Rothstein there was no equity jurisdiction against the State, due to the 11th Amendment to the United States Constitution. Plaintiff's attempt to distinguish Rothstein Br. p. 15, should fail. The 11th Amendment and the Rothstein decision do not depend on the amount of money involved. Defendant WYMAN was held immune from payment of retroactive damages here for the same reason as in Rothstein.

Any doubt as to the correctness of Rothstein was obviated by Edelman v. Jordan, ____ U.S. ____, 39 L. Ed. 2d 662 (325/74). The Supreme Court clearly held that the 11th Amendment barred payment of retroactive public assistance benefits. Even though the State was not named as a party, and individual officials were nominal defendants, the suit was barred because the liability must be paid from the state

treasury. Id. at 672-673.

All of the above does not, for one instant, depend on whether Mrs. Montez, in fact, sustained any loss from the challenged regulations. From the papers submitted by the City defendant, it is abundantly clear she did not.

A. The Constitutional Claim

If appellant were seeking the convening of a three-judge court, 28 U.S.C. § 2281, 2284, it might very well be that her equal protection argument was not "wholly insubstantial", Hagans v. Lavine, ____ U.S. ____, 39 L. Ed. 2d 577 (1974). However this is not an appeal from the denial of a three-judge court and can not be since no injunction was sought after it became clear the only issue was past benefits. It was and is a case for a single judge.

In the circumstances, Judge Metzner held (and Judge Bonsal noted) "the asserted constitutional bases of plaintiff's claim are insubstantial." (Dec., May 7, 1973, p. 4). In a case of this nature, properly before a single judge, he can find the constitutional claim insubstantial, thus barring any recovery on such a theory. See Cancel v. Wyman, supra, 321 F. Supp. at 530, 531. In fact even in Freda v. Lavine, (E.D.N.Y. 1973, 73 C 362, Judd, J., 7/3/73) cited

by appellants as having struck down the step-parent regulation, the District Court only held that the regulation was in conflict with federal regulation; not that there was any constitutional infirmity.*

POINT II

THE ENTIRE ACTION WAS PROPERLY DISMISSED

While we presume the City defendant-appellee will adequately defend his dismissal from the action, we wish to briefly make the following point as to the final order of dismissal.**

If the State defendant is immune from the instant suit for damages, Rothstein v. Wyman, supra, it makes no sense to find liability on the City defendant who was only and solely carrying out a state policy. Indeed the immunity conferred by the 11th Amendment applied in the instant situation to local agencies of the state. This is made clear

---

* Freda, unbeknownst to appellant, was vacated and remanded on appeal for reasons of abstention. ____ F. 2d _____ (2d Cir., Doc. 73-2010, Slip p. 2433). Even if this appeal had merit, the federal court would have to abstain.

**As noted this was May 20, 1974, as the March 25, 1974 decision is a memorandum with a direction to settle an order on notice.

by the introduction to Edelman v. Jordan, supra, 39 L. Ed. 2d 662, at 667, where the respondent there (plaintiff below) sought damages against:

> "...two former directors of the illinois Department of Public Aid, the director of the Cook County Department of Public Aid, and the comptroller of Cook County. (emph. supplied).

These were denied as to all officials. There can be no doubt that the City defendant is in the same position as the County defendants in Edelman. The only conclusion can be that retroactive damages are barred.

CONCLUSION

THE JUDGMENT BELOW SHOULD BE AFFIRMED.

Dated: New York, New York
July 19, 1974

Respectfully submitted,

Louis J. Lefkowitz

LOUIS J. LEFKOWITZ
Attorney General of the
State of New York
Attorney for Defendant-
Appellee WYMAN

SAMUEL A. HIRSHOWITZ
First Assistant Attorney General

A. SETH GREENWALD
Assistant Attorney General
of Counsel

STATE OF NEW YORK)
: SS.:
COUNTY OF NEW YORK)

MAGDALINE GIORDANO, being duly sworn, deposes and says that She is employed in the office of the Attorney General of the State of New York, attorney for Defendant-Appellee Wyman herein. On the 29th day of July, 1974, he served the annexed upon the following named persons :

E. JUDSON JENNINGS
JONATHAN E. WEISS
2095 Broadway - Room 304
New York, New York 10023

ADRIAN P. BURKE
Corporation Counsel
Municipal Building
New York, New York 10007
Att: Mrs. Belkin

Attorney in the within entitled action by depositing 3 copies ~~X~~ true and correct ~~copy~~ thereof, properly enclosed in a post-paid wrapper, in a post-office box regularly maintained by the Government of the United States at Two World Trade Center, New York, New York 10047, directed to said Attorney at the address within the State designated by them for that purpose.

Magdaline Giordano

Sworn to before me this
2nd day of July, 1974

A. Seth Greenwald
Assistant Attorney General
of the State of New York